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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Eduardo Martinez,

10 Petitioner,

11 v.

12 Charles L. Ryan, *et al.*,

13 Respondents.
14

No. CV-15-0521-TUC-BGM

ORDER

15 Currently pending before the Court is Petitioner Eduardo Martinez's *pro se*
16 Petition Under 28 U.S.C. § 2254 for a Writ of Habeas Corpus by a Person in State
17 Custody (Non-Death Penalty) ("Petition") (Doc. 1). Respondents have filed a Limited
18 Answer to Petition for Writ of Habeas Corpus ("Answer") (Doc. 16). No reply was filed.
19 The Petition is ripe for adjudication.
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21 **I. FACTUAL AND PROCEDURAL BACKGROUND**

22 ***A. Initial Charge and Sentencing***

23 The Arizona Court of Appeals stated the facts¹ as follows:

24 On the night of January 7, 2012, Martinez drove a friend's car to a
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26 ¹ As these state court findings are entitled to a presumption of correctness and Petitioner
27 has failed to show by clear and convincing evidence that the findings are erroneous, the Court
28 hereby adopts these factual findings. 28 U.S.C. § 2254(e)(1); *Schriro v. Landrigan*, 550 U.S.
465, 473–74, 127 S.Ct. 1933, 1940, 167 L.Ed.2d 836 (2007); *Wainwright v. Witt*, 469 U.S. 412,
426, 105 S.Ct. 844, 853, 83 L.Ed.2d 841 (1985); *Cf. Rose v. Lundy*, 455 U.S. 509, 519, 102 S.Ct.
1198, 1204, 71 L.Ed.2d 379 (1982).

1 drug store, where he picked up two cases of beer and presented them to the
2 cashier at the front of the store, as if for payment. As the cashier began to
3 ring up the purchase, however, Martinez pulled the beer off the counter and
4 ran out the front door into the parking lot. As he neared the driver's side of
5 a parked vehicle, the store manager, who had been outside, ran towards the
6 car and Martinez threw one of the cases of beer at her, hitting her in the
7 stomach. He then picked up the other case of beer, which he had set down
8 on the pavement, and put it in the car. Upon hurriedly backing out of the
parking space, Martinez nearly struck the manager and a bystander. He
was apprehended several months later, and in a police interview admitted
taking the cases of beer without paying for them.

9 Answer (Doc. 16), Ariz. Ct. of Appeals, Case No. 2 CA-CR 2013-0043, Memorandum
10 Decision 10/29/2013 (Exh. "A") (Doc. 17) at 4.² Following a jury trial, Petitioner was
11 found guilty of one count of robbery and two counts of endangerment. Answer (Doc.
12 16), Ariz. Superior Ct., Pima County, Case No. CR20121612-001, Minute Entry
13 12/6/2012 (Exh. "B") (Doc. 17) at 14. On January 22, 2013, Petitioner was sentenced to
14 a presumptive ten (10) year term of imprisonment for the robbery charge, as well as two
15 presumptive two and one half (2.5) year sentences for the endangerment counts. Answer
16 (Doc. 16), Ariz. Superior Ct., Pima County, Case No. CR20121612-001, Minute Entry
17 1/22/2013 (Exh. "C") (Doc. 17) at 18–19. Petitioner's terms of imprisonment were
18 ordered to run concurrently. *Id.*, Exh. "C" at 18–19.

19 ***B. Direct Appeal***

20 On January 29, 2013, counsel for the Petitioner filed a Notice of Appeal from the
21 judgment and sentence. *See* Answer (Doc. 16), Ariz. Superior Ct., Pima County, Case
22 No. CR20121612-001, Def.'s Not. of Appeal 1/29/2013 (Exh. "D") (Doc. 17). On May
23 13, 2013, counsel for Petitioner filed an Opening Brief asserting a single issue for review.
24 Answer (Doc. 16), Ariz. Ct. of Appeals, Case No. 2 CA-CR 2013-0043, Appellant's
25 Opening Br. 5/13/2013 (Exh. "E") (Doc. 17). Petitioner argued that the trial court's
26 alleged failure to instruct the jury on the lesser included offenses of Theft and Attempted
27 Robbery denied him due process and his constitutional right to a fair trial. *Id.*, Exh. "E"

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² Page citations refer to the CM/ECF page number for ease of reference.

1 at 29–32.

2 On October 29, 2013, the Arizona Court of Appeals issued its decision affirming
3 Petitioner’s conviction and sentences but vacating the criminal restitution order (“CRO”)
4 entered by the trial court against Petitioner. *See* Answer (Doc. 16) Ariz. Ct. of Appeals,
5 Case No. 2 CA-CR 2013-0043, Mem. Decision 10/29/2013 (Exh. “A”) (Doc. 17).
6 Reviewing for fundamental error, the appellate court stated that “[a] court must instruct
7 the jury on a lesser-included offense of the crime charged if the evidence supports the
8 requested instruction[;] . . . [h]owever, a lesser-included instruction is not required merely
9 because a jury could disbelieve all the evidence of the greater charge except the elements
10 of the lesser.” *Id.*, Exh. “A” at 5 (citing *State v. Vickers*, 159 Ariz. 532, 542, 768 P.2d
11 1177, 1187 (1989); then citing Ariz. R. Crim. P. 23.3; then citing *State v. Bolton*, 182
12 Ariz. 290, 309, 896 P.2d 830, 849 (1995)). The appellate court further stated that “[s]uch
13 an instruction is necessary only where a jury could ‘rationally fail to find the
14 distinguishing element of the greater offense.’” Answer (Doc. 16), Exh. “A” at 5–6
15 (citing *State v. Krone*, 182 Ariz. 319, 323, 897 P.2d 621, 625 (1995)). Based on Arizona
16 law, the appellate court posited that Petitioner “was entitled to an instruction on theft if a
17 jury could reasonably find from the evidence in the record that his conceded use of
18 force[] was not an attempt to retain control of the beer he had in his arms when he exited
19 the store.” Answer (Doc. 16), Exh. “A” at 6–7 (footnote omitted). The appellate court
20 considered the record and concluded that “because Martinez’s conduct was inconsistent
21 with a reasonable finding that he lacked any motive ‘to coerce surrender of property or to
22 prevent resistance to [his] taking or retaining property by his use of force, § 13-1902(A),
23 a theft instruction was not required.” *Id.*, Exh. “A” at 10 (citing *State v. Routhier*, 137
24 Ariz. 90, 99, 669 P.2d 68, 77 (1983)) (alterations in original). As such, the appellate
25 court upheld the trial court’s denial of Petitioner’s request for a theft instruction. Answer
26 (Doc. 16), Exh. “A” at 11. The appellate court further held that the trial court did not err
27 by refusing to give an attempted robbery instruction. *Id.*, Exh. “A” at 11–12. The
28 appellate court did find fundamental error in the trial court’s CRO, because it was

1 imposed prior to the expiration of Petitioner's sentence. *Id.*, Exh. "A" at 12 (citing *State*
2 *v. Lopez*, 231 Ariz. 561 ¶ 2, 298 P.3d 909, 910 (Ct. App. 2013)). As such, the court of
3 appeals vacated the CRO, but "affirm[ed] Martinez's convictions and sentences in all
4 other respects." Answer (Doc. 16), Exh. "A" at 12. On January 9, 2014, the court of
5 appeals issued its mandate indicating that Petitioner had not filed a motion for
6 reconsideration or sought review with the Arizona Supreme Court. Answer (Doc. 16),
7 Ariz. Ct. of Appeals, Case No. 2 CA-CR 2013-0043, Mandate 1/9/2014 (Exh. "G") (Doc.
8 17).

9 ***C. Post-Conviction Relief Proceeding***

10 On November 18, 2013, Petitioner filed his Notice of Post-Conviction Relief
11 ("PCR"). Answer (Doc. 16), Ariz. Superior Ct., Pima County, Case No. CR20121612-
12 001, Def.'s Notice of PCR 11/18/2013 (Exh. "H") (Doc. 17). On December 16, 2013, the
13 trial court appointed counsel to Petitioner for the Rule 32 proceeding. *See* Answer (Doc.
14 16), Ariz. Superior Ct., Pima County, Case No. CR20121612-001, Notice 12/16/2013
15 (Exh. "I") (Doc. 17). On August 7, 2014, Petitioner timely filed his Petition for Post-
16 Conviction Relief. Answer (Doc. 16), Ariz. Superior Ct., Pima County, Case No.
17 CR20121612-001, Pet.'s Pet. for PCR (Exh. "K") (Doc. 17); *see also* Answer (Doc. 16),
18 Ariz. Superior Ct., Pima County, Case No. CR20121612-001, Order 2/18/2014 &
19 3/21/2014 & 6/2/2014 & 7/10/2014 (Exh. "J") (Doc. 17).

20 Petitioner asserted two (2) claims of ineffective assistance of trial counsel 1) for
21 failing to have a court interpreter assist Petitioner during trial and "other critical junctures
22 of the case"; and 2) for failing to request a jury instruction for the lesser included offense
23 as to the endangerment counts. *See* Answer (Doc. 16), Ariz. Superior Ct., Pima County,
24 Case No. CR20121612-001, Pet.'s Pet. for PCR (Exh. "K") (Doc. 17). Petitioner also
25 asserted a single claim of ineffective assistance of appellate counsel for an alleged failure
26 to raise the lesser included jury instruction as to endangerment on appeal. *See id.*, Exh.
27 "K."

28 On October 28, 2014, the Rule 32 court denied relief and dismissed Petitioner's

1 petition. See Answer (Doc. 16), Ariz. Superior Ct., Pima County, Case No.
2 CR20121612, Ruling, In Chambers Re: Petition for Post Conviction Relief 10/28/2014
3 (Exh. “N”) (Doc. 18). The Rule 32 court delineated the test for ineffective assistance of
4 counsel, stating “[t]o state a colorable claim of ineffective assistance of counsel,
5 Petitioner must show 1) that counsel’s performance fell below objectively reasonable
6 standards, and 2) that this performance prejudiced the defendant.” *Id.*, Exh. “N” at 18
7 (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984);
8 then citing *State v. Jackson*, 209 Ariz. 13, 14, 97 P.3d 113, 114 (Ct. App. 2004)).

9 Regarding Petitioner’s claimed need for an interpreter, the Rule 32 court noted
10 that “[t]he trial court is in the best position to determine whether a defendant ‘possesses
11 the requisite degree of fluency in the English language so that his right to confront
12 witnesses, right to cross-examine those witnesses and right to competent counsel will not
13 be abridged.’” Answer (Doc. 16), Exh. “N” at 19 (quoting *State v. Natividad*, 111 Ariz.
14 191, 194, 526 P.2d 730, 733 (1974); then citing *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct.
15 1065, 13 L.Ed.2d 923 (1965)). The Rule 32 court highlighted that “Petitioner interacted
16 with pre-trial services, two English speaking attorneys, two different Divisions in this
17 court[], and the probation department in the creation of the pre-sentence report[,] . . .
18 [and] wrote an articulate, largely grammatically correct Change Plan while awaiting
19 sentencing and a letter of similar skill and proficiency in this Rule 32 process.” Answer
20 (Doc. 16), Exh. “N” at 20. The Rule 32 court further noted no one that Petitioner came in
21 contact with indicated the need for an interpreter, nor did Petitioner request “an
22 interpreter of the Court, even though he was directly addressed during hearings, and
23 although he requested (and received) a new attorney[,] . . . rejected two pleas and made
24 two *Donald* records[,] . . . and fully participated in his pre-sentence report.” *Id.*, Exh.
25 “N” at 20. The Rule 32 court “[c]onsider[ed] Petitioner’s experience with the justice
26 system and the procedural history of this case, . . . [and] d[id] not question Petitioner’s
27 ability to understand the proceedings; [and found that] he was present and a full
28 participation.” *Id.*, Exh. “N” at 21. As such, the Rule 32 court held that counsel did not

1 fall below “objectively reasonable standards” regarding Petitioner’s alleged need for an
2 interpreter. *Id.*, Exh. “N” at 21.

3 Next, the Rule 32 court considered the jury instructions provided at trial regarding
4 endangerment. Answer (Doc. 16), Exh. “N” at 21–22. The Rule 32 court noted “that the
5 Jury was given the option of imminent death *or* physical injury as the two ways that
6 endangerment could have been committed[,] [and] [b]ecause there was an issue of
7 whether there was a risk of imminent death, the court used a special verdict pursuant to
8 *State v. Carpenter*, 141 Ariz. 29, 684 P.2d 910 (App. 1984).” Answer (Doc. 16), Exh.
9 “N” at 21 (emphasis in original). The Rule 32 court further noted that “[h]ad the jury not
10 *unanimously* found the Petitioner endangered each victim with a substantial risk of
11 imminent death, they would have convicted him of only the lower class of
12 endangerment[.]” *Id.*, Exh. “N” at 22 (emphasis in original). In light of the jury
13 instructions and special interrogatory, the Rule 32 court held that neither trial nor
14 appellate counsel were ineffective regarding the endangerment instruction. *Id.*, Exh. “N”
15 at 22–23.

16 On December 22, 2014, Petitioner sought review by the Arizona Court of Appeals
17 of the denial of his PCR petition. *See* Answer (Doc. 16), Ariz. Ct. of Appeals, Case No.
18 2 CA-Cr 2014-0429-PR, Pet.’s Pet. for Review (Exh. “P”) (Doc. 18). Petitioner asserted
19 that “[t]he court’s ruling [regarding Petitioner’s need for an interpreter] [wa]s contrary to
20 all evidence [sic] presented in Mr. Martinez’[s] petition for post conviction relief[.]” *Id.*,
21 Exh. “P” at 29. Petitioner further asserted that “[t]he court’s reliance on *State v.*
22 *Natividad* [wa]s totally misplaced.” *Id.*, Exh. “P” at 29. Petitioner reiterated the
23 evidence presented to the Rule 32 court in support of his alleged need for an interpreter
24 and argued that the *Natividad* decision required a hearing to establish whether Petitioner
25 is entitled to the relief sought. *Id.*, Exh. “P” at 30–34. Petitioner did not raise any other
26 issues for review. *See* Answer (Doc. 16), Exh. “P.”

27 On March 12, 2015, the Arizona Court of Appeals granted review, but denied
28 relief. *See* Answer (Doc. 16), Ariz. Ct. of Appeals, Case No. 2 CA-CR 2014-0429-PR,

1 Mem. Decision 3/12/2015 (Exh. “Q”) (Doc. 18). The appellate court reviewed
2 Petitioner’s initial PCR petition and the Rule 32 court’s decision. *Id.*, Exh. “Q” at 77–79.
3 The appellate court noted “that this case is readily distinguishable from *Natividad*, which
4 Martinez relies on for the proposition that he is entitled to an evidentiary hearing.” *Id.*,
5 Exh. “Q” at 80. The appellate court explained that “[i]n *Natividad*, our supreme court
6 remanded for such a hearing, in part, because the record was ‘barren of a reliable
7 indication as to the defendant’s ability to comprehend’ or speak English.” *Id.*, Exh. “Q”
8 at 80 (quoting *State v. Natividad*, 111 Ariz. 191, 193, 526 P.2d 730, 732 (1974)). The
9 appellate court reviewed the record regarding the evidence supporting Petitioner’s
10 English abilities, noting:

11 By way of further example of his proficiency in English, when the trial
12 court asked Martinez at sentencing if he wanted to say anything, he
13 responded as follows:

14 Yeah, Your Honor. I just want to apologize to the victim
15 here. That night I was on drugs that did bad stuff to me. I
16 was, I know I was acting — some parts I barely remember,
17 but, since I’ve seen the video and everything, that wasn’t
really me. I[t] was some other person. I wouldn’t act like
that. I just want to apologize to the victim. That’s it.

18 Answer (Doc. 16), Exh. “Q” at 80 n.4 (alterations in original). The appellate court also
19 remarked that “the record before us does not suggest that at any point Martinez indicated
20 in any way that he did not understand the proceedings” and pointed out that “Martinez
21 was aware of [the option to have an interpreter], yet he did not ask the trial court to
22 appoint one when, according to him, his attorney had denied his request.” *Id.*, Exh. “Q”
23 at 81. The appellate court held that “the trial court correctly concluded Martinez did not
24 sustain a claim of ineffective assistance of counsel.” *Id.*, Exh. “Q” at 81 (citing *State v.*
25 *McDaniel*, 136, Ariz. 188, 198, 665 P.2d 70, 80 (1983)).

26 On April 9, 2015, Petitioner filed his Petition for Review to the Arizona Supreme
27 Court. See Answer (Doc. 16), Arizona Supreme Court, Case No. CR-15-0123-PR, Pet.’s
28 Pet. for Review (Exh. “R”) (Doc. 18). On September 22, 2015, the Arizona Supreme

1 Court denied review. *See* Answer (Doc. 16), Arizona Supreme Court, Case No. CR-15-
2 0123-PR, Memorandum 9/22/2015 (Exh. “S”) (Doc. 18). On October 8, 2015, the
3 Arizona Court of Appeals issued its mandate. *See* Answer (Doc. 16), Ariz. Ct. of
4 Appeals, Case No. 2 CA-CR 2014-0429-PR, Mandate 10/8/2015 (Exh. “T”) (Doc. 18).

5 ***D. The Instant Habeas Proceeding***

6 On November 6, 2015, Petitioner filed his Petition Under 28 U.S.C. § 2254 for a
7 Writ of Habeas Corpus by a Person in State Custody (Doc. 1). Petitioner claims three (3)
8 grounds for relief. First, Petitioner alleges a “[v]iolation of the 14th Amend[ment] of the
9 U.S. Constitution; Defendant was denied the basic right to Due Process by his counsel’s
10 failure to make the appropriate legal motions, etc. to obtain a Court Interpreter [sic] after
11 Defendant informed him he needed one[.]” Petition (Doc. 1) at 6. Petitioner asserts that
12 this “depriv[ed] him to interact [sic] in his Court Proceedings in a knowing [and]
13 informed manner, . . . [and did not] allow[] him to be an active participant in his pre-trial,
14 trial, [and] sentencing proceedings.” *Id.* Petitioner notes that “[i]n previous Court cases
15 the Defendant had a court interpreter assigned to him but in others he did not[.]”
16 however, “[d]ue to the lack of this interpreter the Defendant didn’t understand what was
17 going on during Court proceedings in a knowing [and] intelligent manner.” *Id.* Second,
18 Petitioner alleges a “[v]iolation of the 14th Amend[ment] of the U.S. Constitution[,]
19 [because] [t]rial counsel was ineffective in failing to request lesser included offense
20 instructions to the endangerment counts.” Petition (Doc. 1) at 7. Third, Petitioner further
21 asserts that appellate counsel was ineffective for the same failure to request a lesser
22 included offense instruction. *Id.*

23 On April 6, 2016, Respondents filed their Limited Answer (Doc. 16) asserting that
24 Petitioner had only advanced unexhausted claims in his federal habeas petition.
25 Respondents argue that Petitioner’s first claim regarding a court interpreter was only
26 presented in the state court as an alleged Sixth Amendment violation, with only passing
27 reference to due process. Answer (Doc. 16) at 8–9. Respondents further argue that
28 Petitioner’s second claim regarding the lesser-included-offense jury instruction was never

1 referred to as a Fourteenth Amendment violation in the state courts, nor was it ever
2 presented to the Arizona Court of Appeals. *Id.* at 9–10. Petitioner did not file a reply.

3 4 **II. STANDARD OF REVIEW**

5 ***A. In General***

6 The federal courts shall “entertain an application for a writ of habeas corpus in
7 behalf of a person in custody pursuant to the judgment of a State court only on the ground
8 that he is in custody *in violation of the Constitution or laws of treaties of the United*
9 *States.*” 28 U.S.C. § 2254(a) (emphasis added). Moreover, a petition for habeas corpus
10 by a person in state custody

11 shall not be granted with respect to any claim that was adjudicated on the
12 merits in State court proceedings unless the adjudication of the claim – (1)
13 resulted in a decision that was contrary to, or involved an unreasonable
14 application of, clearly established Federal law, as determined by the
15 Supreme Court of the United States; or (2) resulted in a decision that was
based on an unreasonable determination of the facts in light of the evidence
presented in the State court proceeding.

16 28 U.S.C. § 2254(d); *see also Cullen v. Pinholster*, 563 U.S. 170, 131 S.Ct. 1388, 1398,
17 179 L.Ed.2d 557 (2011). Correcting errors of state law is not the province of federal
18 habeas corpus relief. *Estelle v. McGuire*, 502 U.S. 62, 67, 112 S.Ct. 475, 480, 116
19 L.Ed.2d 385 (1991). Ultimately, “[t]he statute’s design is to ‘further the principles of
20 comity, finality, and federalism.’” *Panetti v. Quarterman*, 551 U.S. 930, 945, 127 S.Ct.
21 2842, 2854, 168 L.Ed.2d 662 (2007) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 337,
22 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003)). Furthermore, this standard is difficult to meet
23 and highly deferential “for evaluating state-court rulings, [and] which demands that state-
24 court decisions be given the benefit of the doubt.” *Pinholster*, 131 S.Ct. at 1398
25 (citations and internal quotation marks omitted).

26 The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 110 Stat.
27 1214, mandates the standards for federal habeas review. *See* 28 U.S.C. § 2254. The
28 “AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims

1 have been adjudicated in state court.” *Burt v. Titlow*, 571 U.S. 12, 19, 134 S.Ct. 10, 16,
2 187 L.Ed.2d 348 (2013). Federal courts reviewing a petition for habeas corpus must
3 “presume the correctness of state courts’ factual findings unless applicants rebut this
4 presumption with ‘clear and convincing evidence.’” *Schriro v. Landrigan*, 550 U.S. 465,
5 473–74, 127 S.Ct. 1933, 1940, 167 L.Ed.2d 836 (2007) (citing 28 U.S.C. § 2254(e)(1)).
6 Moreover, on habeas review, the federal courts must consider whether the state court’s
7 determination was unreasonable, not merely incorrect. *Id.*, 550 U.S. at 473, 127 S.Ct. at
8 1939; *Gulbrandson v. Ryan*, 738 F.3d 976, 987 (9th Cir. 2013). Such a determination is
9 unreasonable where a state court properly identifies the governing legal principles
10 delineated by the Supreme Court, but when the court applies the principles to the facts
11 before it, arrives at a different result. See *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct.
12 770, 178 L.Ed.2d 624 (2011); *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146
13 L.Ed.2d 389 (2000); see also *Casey v. Moore*, 386 F.3d 896, 905 (9th Cir. 2004).
14 “AEDPA requires ‘a state prisoner [to] show that the state court’s ruling on the claim
15 being presented in federal court was so lacking in justification that there was an error . . .
16 beyond any possibility for fairminded disagreement.’” *Burt*, 571 U.S. at 19–20, 134 S.Ct.
17 at 16 (quoting *Harrington*, 562 U.S. at 103, 131 S.Ct. at 786–87) (alterations in original).

18 ***B. Exhaustion of State Remedies***

19 Prior to application for a writ of habeas corpus, a person in state custody must
20 exhaust all of the remedies available in the State courts. 28 U.S.C. § 2254(b)(1)(A). This
21 “provides a simple and clear instruction to potential litigants: before you bring any claims
22 to federal court, be sure that you first have taken each one to state court.” *Rose v. Lundy*,
23 455 U.S. 509, 520, 102 S.Ct. 1198, 1204, 71 L.Ed.2d 379 (1982). As such, the
24 exhaustion doctrine gives the State “the opportunity to pass upon and correct alleged
25 violations of its prisoners’ federal rights.” *Baldwin v. Reese*, 541 U.S. 27, 29, 124 S.Ct.
26 1347, 1349, 158 L.Ed.2d 64 (2004) (internal quotations omitted). Moreover, “[t]he
27 exhaustion doctrine is principally designed to protect the state courts’ role in the
28 enforcement of federal law and prevent disruption of state judicial proceedings.” *Rose*,

1 455 U.S. at 518, 102 S.Ct. at 1203 (internal citations omitted). This upholds the doctrine
2 of comity which “teaches that one court should defer action on causes properly within its
3 jurisdiction until the courts of another sovereignty with concurrent powers, and already
4 cognizant of the litigation, have had an opportunity to pass upon the matter.” *Id.* (quoting
5 *Darr v. Burford*, 339 U.S. 200, 204, 70 S.Ct. 587, 590, 94 L.Ed. 761 (1950)).

6 Section 2254(c) provides that claims “shall not be deemed . . . exhausted” so long
7 as the applicant “has the right under the law of the State to raise, by any available
8 procedure the question presented.” 28 U.S.C. § 2254(c). “[O]nce the federal claim has
9 been fairly presented to the state courts, the exhaustion requirement is satisfied.” *Picard*
10 *v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971). The fair
11 presentation requirement mandates that a state prisoner must alert the state court “to the
12 presence of a federal claim” in his petition, simply labeling a claim “federal” or expecting
13 the state court to read beyond the four corners of the petition is insufficient. *Baldwin v.*
14 *Reese*, 541 U.S. 27, 33, 124 S.Ct. 1347, 1351, 158 L.Ed.2d 64 (2004) (rejecting
15 petitioner’s assertion that his claim had been “fairly presented” because his brief in the
16 state appeals court did not indicate that “he was complaining about a violation of federal
17 law” and the justices having the opportunity to read a lower court decision addressing the
18 federal claims was not fair presentation); *Hiivala v. Wood*, 195 F.3d 1098 (9th Cir. 1999)
19 (holding that petitioner failed to exhaust federal due process issue in state court because
20 petitioner presented claim in state court only on state grounds). Furthermore, in order to
21 “fairly present” one’s claims, the prisoner must do so “in each appropriate state court.”
22 *Baldwin*, 541 U.S. at 29, 124 S.Ct. at 1349. “Generally, a petitioner satisfies the
23 exhaustion requirement if he properly pursues a claim (1) throughout the entire direct
24 appellate process of the state, or (2) throughout one entire judicial postconviction process
25 available in the state.” *Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004) (quoting
26 Liebman & Hertz, *Federal Habeas Corpus Practice and Procedure*, § 23.3b (9th ed.
27 1998)).

1 In Arizona, however, for non-capital cases “review need not be sought before the
2 Arizona Supreme Court in order to exhaust state remedies.” *Swoopes v. Sublett*, 196 F.3d
3 1008, 1010 (9th Cir. 1999); *see also Crowell v. Knowles*, 483 F.Supp.2d 925 (D. Ariz.
4 2007); *Moreno v. Gonzalez*, 192 Ariz. 131, 962 P.2d 205 (1998). Additionally, the
5 Supreme Court has further interpreted § 2254(c) to recognize that once the state courts
6 have ruled upon a claim, it is not necessary for an applicant to seek collateral relief for
7 the same issues already decided upon direct review. *Castille v. Peoples*, 489 U.S. 346,
8 350, 109 S.Ct. 1056, 1060, 103 L.Ed.2d 380 (1989).

9 ***C. Procedural Default***

10 “A habeas petitioner who has defaulted his federal claims in state court meets the
11 technical requirements for exhaustion; there are no state remedies any longer ‘available’
12 to him.” *Coleman v. Thompson*, 501 U.S. 722, 732, 111 S.Ct. 2546, 2555, 115 L.Ed.2d
13 650 (1991). Moreover, federal courts “will not review a question of federal law decided
14 by a state court if the decision of that court rests on a state law ground that is independent
15 of the federal question and adequate to support the judgment.” *Id.*, 501 U.S. at 728, 111
16 S.Ct. at 2254. This is true whether the state law basis is substantive or procedural. *Id.*
17 (citations omitted). Such claims are considered procedurally barred from review. *See*
18 *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

19 The Ninth Circuit Court of Appeals explained the difference between exhaustion
20 and procedural default as follows:

21 The exhaustion doctrine applies when the state court has never been
22 presented with an opportunity to consider a petitioner’s claims and that
23 opportunity may still be available to the petitioner under state law. In
24 contrast, the procedural default rule barring consideration of a federal claim
25 applies only when a state court has been presented with the federal claim,
26 but declined to reach the issue for procedural reasons, or if it is clear that
27 the state court would hold the claim procedurally barred. *Franklin v.*
28 *Johnson*, 290 F.3d 1223, 1230 (9th Cir. 2002) (internal quotation marks and
citations omitted). Thus, in some circumstances, a petitioner’s failure to
exhaust a federal claim in state court may *cause* a procedural default. *See*
Sandgathe v. Maass, 314 F.3d 371, 376 (9th Cir. 2002); *Beaty v. Stewart*,
303 F.3d 975, 987 (9th Cir. 2002) (“A claim is procedurally defaulted ‘if

1 the petitioner failed to exhaust state remedies and the court to which the
2 petitioner would be required to present his claims in order to meet the
3 exhaustion requirement would now find the claims procedurally barred.”)
4 (quoting *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546,
115 L.Ed.2d 640 (1991)).

5 *Cassett v. Stewart*, 406 F.3d 614, 621 n.5 (9th Cir. 2005). Thus, a prisoner’s habeas
6 petition may be precluded from federal review due to procedural default in two ways.
7 First, where the petitioner presented his claims to the state court, which denied relief
8 based on independent and adequate state grounds. *Coleman*, 501 U.S. at 728, 111 S.Ct.
9 at 2254. Federal courts are prohibited from review in such cases because they have “no
10 power to review a state law determination that is sufficient to support the judgment,
11 resolution of any independent federal ground for the decision could not affect the
12 judgment and would therefore be advisory.” *Id.* Second, where a “petitioner failed to
13 exhaust state remedies and the court to which the petitioner would be required to present
14 his claims in order to meet the exhaustion requirement would now find the claims
15 procedurally barred.” *Id.* at 735 n.1, 111 S.Ct. at 2557 n.1 (citations omitted). Thus, the
16 federal court “must consider whether the claim could be pursued by any *presently*
17 *available* state remedy.” *Cassett*, 406 F.3d at 621 n.6 (quoting *Ortiz v. Stewart*, 149 F.3d
18 923, 931 (9th Cir. 1998)) (emphasis in original).

19 Where a habeas petitioner’s claims have been procedurally defaulted, the federal
20 courts are prohibited from subsequent review unless the petitioner can show cause and
21 actual prejudice as a result. *Teague v. Lane*, 489 U.S. 288, 298, 109 S.Ct. 1060, 1068,
22 103 L.Ed.2d 334 (1989) (holding that failure to raise claims in state appellate proceeding
23 barred federal habeas review unless petitioner demonstrated cause and prejudice); *see*
24 *also Smith v. Murray*, 477 U.S. 527, 534, 106 S.Ct. 2661, 2666, 91 L.Ed.2d 434 (1986)
25 (recognizing “that a federal habeas court must evaluate appellate defaults under the same
26 standards that apply when a defendant fails to preserve a claim at trial.”). “[T]he
27 existence of cause for a procedural default must ordinarily turn on whether the prisoner
28 can show that some objective factor external to the defense impeded counsel’s efforts to

1 comply with the State’s procedural rule.” *Murray v. Carrier*, 477 U.S. 478, 488, 106
2 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986); *see also Martinez-Villareal v. Lewis*, 80 F.3d
3 1301, 1305 (9th Cir. 1996) (petitioner failed to offer any cause “for procedurally
4 defaulting his claims of ineffective assistance of counsel, [as such] there is no basis on
5 which to address the merits of his claims.”). In addition to cause, a habeas petitioner
6 must show actual prejudice, meaning that he “must show not merely that the errors . . .
7 created a *possibility* of prejudice, but that they worked to his *actual* and substantial
8 disadvantage, infecting his entire trial with error of constitutional dimensions.” *Murray*,
9 477 U.S. at 494, 106 S.Ct. at 2648 (emphasis in original) (internal quotations omitted).
10 Without a showing of both cause and prejudice, a habeas petitioner cannot overcome the
11 procedural default and gain review by the federal courts. *Id.*, 106 S.Ct. at 2649.

12 The Supreme Court has recognized, however, that “the cause and prejudice
13 standard will be met in those cases where review of a state prisoner’s claim is necessary
14 to correct ‘a fundamental miscarriage of justice.’” *Coleman v. Thompson*, 501 U.S. 722,
15 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) (quoting *Engle v. Isaac*, 456 U.S. 107, 135, 102
16 S.Ct. 1558, 1572–73, 71 L.Ed.2d 783 (1982)). “The fundamental miscarriage of justice
17 exception is available ‘only where the prisoner *supplements* his constitutional claim with
18 a colorable showing of factual innocence.’” *Herrera v. Collins*, 506 U.S. 390, 404, 113
19 S.Ct. 853, 862, 122 L.Ed.2d 203 (1993) (emphasis in original) (quoting *Kuhlmann v.*
20 *Wilson*, 477 U.S. 436, 454, 106 S.Ct. 2616, 2627, 91 L.Ed.2d 364 (1986)). Thus, “‘actual
21 innocence’ is not itself a constitutional claim, but instead a gateway through which a
22 habeas petitioner must pass to have his otherwise barred constitutional claim considered
23 on the merits.” *Herrera*, 506 U.S. at 404, 113 S.Ct. at 862. Further, in order to
24 demonstrate a fundamental miscarriage of justice, a habeas petitioner must “establish by
25 clear and convincing evidence that but for the constitutional error, no reasonable
26 factfinder would have found [him] guilty of the underlying offense.” 28 U.S.C. §
27 2254(e)(2)(B).

1 In Arizona, a petitioner's claim may be procedurally defaulted where he has
2 waived his right to present his claim to the state court "at trial, on appeal or in any
3 previous collateral proceeding." Ariz. R. Crim. P. 32.2(a)(3). "If an asserted claim is of
4 sufficient constitutional magnitude, the state must show that the defendant 'knowingly,
5 voluntarily and intelligently' waived the claim." *Id.*, 2002 cmt. Neither Rule 32.2 nor
6 the Arizona Supreme Court has defined claims of "sufficient constitutional magnitude"
7 requiring personal knowledge before waiver. *See id.*; *see also Stewart v. Smith*, 202 Ariz.
8 446, 46 P.3d 1067 (2002). The Ninth Circuit Court of Appeals recognized that this
9 assessment "often involves a fact-intensive inquiry" and the "Arizona state courts are
10 better suited to make these determinations." *Cassett*, 406 F.3d at 622.

11 12 **III. STATUTE OF LIMITATIONS**

13 As a threshold matter, the Court must consider whether Petitioner's petition is
14 barred by the statute of limitation. *See White v. Klizkie*, 281 F.3d 920, 921–22 (9th Cir.
15 2002). The AEDPA mandates that a one-year statute of limitations applies to
16 applications for a writ of habeas corpus by a person in state custody. 28 U.S.C. §
17 2244(d)(1). Section 2244(d)(1) provides that the limitations period shall run from the
18 latest of:

19 (A) the date on which the judgment became final by the conclusion of
20 direct review or the expiration of the time for seeking such review;

21 (B) the date on which the impediment to filing an application created by
22 the State action in violation of the Constitution or laws of the United States
is removed, if the applicant was prevented from filing by such State action;

23 (C) the date on which the constitutional right asserted was initially
24 recognized by the Supreme Court, if the right has been newly recognized
25 by the Supreme Court and made retroactively applicable to cases on
collateral review; or

26 (D) the date on which the factual predicate of the claim or claims
presented could have been discovered through the exercise of due diligence.

27 28 U.S.C. § 2244(d)(1); *Shannon v. Newland*, 410 F.3d 1083 (9th Cir. 2005). "The time
28 during which a properly filed application for State post-conviction or other collateral

1 review with respect to the pertinent judgment or claim is pending shall not be counted
2 toward any period of limitation under this subsection.” 28 U.S.C. § 2244(d)(2).
3 Respondents do not dispute the timeliness of Martinez’s petition. The Court has
4 independently reviewed the record and finds that the Petition (Doc. 1) is timely pursuant
5 to 28 U.S.C. § 2244(d)(1)(A).

6 7 **IV. ANALYSIS**

8 **A. *Ground One: Court Interpreter***

9 Petitioner asserts that his due process rights, guaranteed under the Fourteenth
10 Amendment to the United States Constitution, were violated because trial counsel
11 allegedly failed to obtain a court interpreter for court proceedings. Petition (Doc. 1) at 6.
12 Respondents assert that “[i]n his PCR petition, Martinez asserted that he was denied his
13 right to the effective assistance of counsel because his counsel failed to obtain an
14 interpreter for him during the trial court proceedings[;] [however,] [t]he petition contains
15 a single . . . passing reference to due process . . . [and] does not refer to the federal
16 constitution or law[.]” Answer (Doc. 16) at 8. Respondents further argue that this was
17 “insufficient to constitute fair presentation of a Fourteenth Amendment due process
18 violation claim to the state court.” *Id.* (citations omitted). The Court agrees with
19 Respondents.

20 **1. Failure to Exhaust**

21 In Petitioner’s PCR petition, he framed the issue as “trial counsel was ineffective
22 in failing to ensure that defendant was assisted by a court interpreter during trial and
23 other critical junctures of the case.” Answer (Doc. 16), Ariz. Superior Ct., Pima County,
24 Case No. CR-20121612-001, Pet.’ Pet. for PCR (Exh. “K”) at 69. Petitioner asserted that
25 “[t]here is long standing authority in Arizona courts that a defendant’s inability to
26 spontaneously understand testimony being given would undoubtedly limit his attorney’s
27 effectiveness, especially on cross examination.” *Id.*, Exh. “K” at 71 (citing *State v.*
28 *Natividad*, 111 Ariz. 191, 526 P.2d 730 (1974)). Petitioner further noted that “[t]hese

1 cases make it clear that in such a case the lack of interpretation possibly infringes on the
2 right to be present in the courtroom at every state of the trial.” Answer (Doc. 16), Exh.
3 “K” at 71. As such, Petitioner argued that an evidentiary hearing was required and “[t]his
4 issue[] go[es] to the heart of defendant’s ability to understand the courtroom proceedings,
5 goes to the heart of a due process and a fair hearing.” *Id.*, Exh. “K” at 71. Although
6 Petitioner cited a Pennsylvania district court case, as well as a New Mexico state court
7 case, his petition is devoid of reference to the United States Constitution or Supreme
8 Court of the United States’ precedent. In light of this deficiency, Respondents argue that
9 Petitioner did not “fair[ly] present[] . . . a Fourteenth Amendment due process violation
10 claim to the state court.” Answer (Doc. 16) at 9. Furthermore, on appeal, Petitioner
11 raised this claim solely as a Sixth Amendment right to the effective assistance of counsel
12 violation. Answer (Doc. 16), Arizona Court of Appeals, Case No. 2 CA-CR 2014-0429-
13 PR, Pet.’s Pet. for Review (Exh. “P”) (Doc. 18) at 31–32.

14 The Court agrees with Respondents’ characterization. As such, Petitioner cannot
15 be said to have exhausted this claim. *See Casey v. Moore*, 386 F.3d 896, 916 (9th Cir.
16 2004) (citations omitted) (exhaustion requires pursuing a claim throughout an entire
17 direct appellate or post-conviction process in the state). Moreover, Petitioner’s claim
18 would now be precluded by the Arizona courts. Ariz. R. Crim. P. 32.1(d)–(h), 32.2(a)(3),
19 32.4; *see also Baldwin v. Reese*, 541 U.S. 27, 29, 124 S.Ct. 1347, 1349, 158 L.Ed.2d 64
20 (2004) (in order to “fairly present” one’s claims, the prisoner must do so “in each
21 appropriate state court”). Therefore, Petitioner’s claim is procedurally defaulted.
22 *Coleman v. Thompson*, 501 U.S. 722, 735 n.1, 111 S.Ct. 2546, 2557 n.1, 115 L.Ed.2d 640
23 (1991) (“petitioner failed to exhaust state remedies and the court to which the petitioner
24 would be required to present his claims in order to meet the exhaustion requirement
25 would now find the claims procedurally barred”).

26 Where a habeas petitioner’s claims have been procedurally defaulted, the federal
27 courts are prohibited from subsequent review unless the petitioner can show cause and
28 actual prejudice as a result. *Teague v. Lane*, 489 U.S. 288, 298, 109 S.Ct. 1060, 1068,

1 103 L.Ed.2d 334 (1989) (holding that failure to raise claims in state appellate proceeding
2 barred federal habeas review unless petitioner demonstrated cause and prejudice).
3 Petitioner has not met his burden to show either cause or actual prejudice. *Murray v.*
4 *Carrier*, 477 U.S. 478, 494, 106 S.Ct. 2639, 2648, 91 L.Ed.2d 397 (1986) (Petitioner
5 “must show not merely that the errors . . . created a *possibility* of prejudice, but that they
6 worked to his *actual* and substantial disadvantage, infecting his entire trial with error of
7 constitutional dimensions”) (emphasis in original) (internal quotations omitted); *see also*
8 *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1305 (9th Cir. 1996) (petitioner failed to offer
9 any cause “for procedurally defaulting his claims[,] . . . [and as such,] there is no basis on
10 which to address the merits of his claims.”). Accordingly, Petitioner’s claim that
11 counsel’s alleged failure to obtain a court interpreter violated his Fourteenth Amendment
12 due process rights cannot stand.

13 **2. Ineffective Assistance of Counsel**

14 Even if the Court construes Petitioner’s habeas claim as one for ineffective
15 assistance of counsel in violation of the Sixth Amendment, as well as accepts that he
16 “fairly presented” it to the state courts, the claim is without merit. *See* 28 U.S.C.
17 §2254(b)(2); *Cassett v. Stewart*, 406 F.3d 614, 623–24 (9th Cir. 2005) (a federal court
18 may deny an unexhausted petition on the merits when the petition does not raise a
19 colorable federal claim).

20 **a. Legal Standards**

21 For cases which have been fairly presented to the State court, the Supreme Court
22 elucidated a two-part test for determining whether a defendant could prevail on a claim of
23 ineffective assistance of counsel sufficient to overturn his conviction. *See Strickland v.*
24 *Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, Petitioner must
25 show that counsel’s performance was deficient. *Id.* at 687, 104 S.Ct. at 2064. “This
26 requires showing that counsel made errors so serious that counsel was not functioning as
27 the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Id.* Second, Petitioner
28 must show that this performance prejudiced his defense. *Id.* Prejudice “requires showing

1 that counsel's errors were so serious as to deprive the defendant of a fair trial whose
2 result is reliable." *Id.* Ultimately, whether or not counsel's performance was effective
3 hinges on its reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at
4 688, 104 S.Ct. at 2065; *see also State v. Carver*, 160 Ariz. 167, 771 P.2d 1382 (1989)
5 (adopting *Strickland* two-part test for ineffective assistance of counsel claims). The Sixth
6 Amendment's guarantee of effective assistance is not meant to "improve the quality of
7 legal representation," rather it is to ensure the fairness of trial. *Strickland*, 466 U.S. at
8 689, 104 S.Ct. at 2065. "Thus, '[t]he benchmark for judging any claim of ineffectiveness
9 must be whether counsel's conduct *so undermined* the proper functioning of the
10 adversarial process that the trial cannot be relied on as having produced a just result.'" *Cullen v. Pinholster*, 563 U.S. 170, 131 S.Ct. 1388, 1403, 179 L.Ed.2d 557 (2011)
11 (quoting *Strickland*, 466 at 686) (emphasis and alteration in original).

12
13 "The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' .
14 . . and when the two apply in tandem, review is 'doubly' so[.]" *Harrington v. Richter*,
15 562 U.S. 86, 105, 131 S.Ct. 770, 788, 178 L.Ed.2d 624 (2011) (citations omitted).
16 Judging counsel's performance must be made without the influence of hindsight. *See*
17 *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. As such, "the defendant must overcome
18 the presumption that, under the circumstances, the challenged action 'might be
19 considered sound trial strategy.'" *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76
20 S.Ct. 158, 164, 100 L.Ed. 83 (1955)). Without the requisite showing of either "deficient
21 performance" or "sufficient prejudice," Petitioner cannot prevail on his ineffectiveness
22 claim. *Strickland*, 466 U.S. at 700, 104 S.Ct. at 2071. "[T]he question is not whether
23 counsel's actions were reasonable. The question is whether there is any reasonable
24 argument that counsel satisfied *Strickland's* deferential standard." *Gentry v. Sinclair*, 705
25 F.3d 884, 899 (9th Cir. 2013) (quoting *Harrington*, 562 U.S. at 105, 131 S.Ct. at 788)
26 (alterations in original). "The challenger's burden is to show 'that counsel made errors so
27 serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the
28 Sixth Amendment.'" *Harrington*, 562 U.S. at 104, 131 S.Ct. at 787 (quoting *Strickland*,

1 466 U.S. at 689, 104 S.Ct. 2052). Accordingly, “[w]e apply the doubly deferential
2 standard to review the state court’s ‘last reasoned decision.’” *Vega v. Ryan*, 757 F.3d
3 960, 966 (9th Cir. 2014) (citations omitted). “By its terms § 2254(d) bars relitigation of
4 any claim ‘adjudicated on the merits’ in state court, subject only to the exceptions in
5 2254(d)(1) and (d)(2).” *Harrington*, 131 U.S. at 98, 131 S.Ct. at 784. As such, Petitioner
6 also bears the burden of showing that the state court applied *Strickland* to the facts of his
7 case in an objectively unreasonable manner. *See Bell v. Cone*, 535 U.S. 685, 698–99, 122
8 S.Ct. 1843, 1852, 152 L.Ed.2d 914 (2002); *see also* 28 U.S.C. § 2254(d).

9 Additionally, “[a]s a general matter, each ‘unrelated alleged instance [] of
10 counsel’s ineffectiveness’ is a separate claim for purposes of exhaustion.” *Gulbrandson*
11 *v. Ryan*, 738 F.3d 976, 992 (9th Cir. 2013) (quoting *Moormann v. Schriro*, 426 F.3d
12 1044, 1056 (9th Cir. 2005)) (alterations in original). This means “all operative facts to an
13 ineffective assistance claim must be presented to the state courts in order for a petitioner
14 to exhaust his remedies.” *Hemmerle v. Schriro*, 495 F.3d 1069, 1075 (9th Cir. 2007).
15 This is “[b]ecause ineffective assistance claims are not fungible, but are instead highly
16 fact-dependent, [requiring] some baseline explication of the facts relating to it[.]” *Id.* As
17 such, “a petitioner who presented any ineffective assistance of counsel claim below
18 can[not] later add unrelated instances of counsel’s ineffectiveness to that claim.” *Id.*
19 (citations and internal quotations omitted); *see also Date v. Schriro*, 619 F.Supp.2d 736,
20 788 (D. Ariz. 2008) (“Petitioner’s assertion of a claim of ineffective assistance of counsel
21 based on one set of facts, does not exhaust other claims of ineffective assistance based on
22 different facts”).

23 **b. Prejudice**

24 Petitioner cannot demonstrate prejudice. The Arizona Court of Appeals described
25 Petitioner’s participation in the court proceedings as follows:

26 [A]s the trial court noted, Martinez meaningfully participated in two
27 *Donald* hearings.[4] *State v. Donald*, 198 Ariz. 406, 526 P.3d 1193 (App.
28 2000). Importantly, the minute entry from the second of those hearings
provides that not only did Martinez respond to questions about the plea, but
he satisfied the court that he had “knowingly, intelligently and voluntarily

1 reject[ed]” it. *See State v. Gourdin*, 156 Ariz. 337, 338-39, 751 P.2d 997,
2 998-99 (App. 1988) (appellant’s contention he could not understand
3 proceeding without interpreter undercut by participation in court and
4 answering questions including whether he read, signed, and understood
plea agreement).

5 Moreover, the record before us does not suggest that at any point
6 Martinez indicated in any way that he did not understand the proceedings.
7 Additionally, having been provided or offered an interpreter in many of his
8 prior cases, Martinez was aware of that option, yet he did not ask the trial
court to appoint one when, according to him, his attorney had denied his
request.

9
10 [4] By way of further example of his proficiency in English, when
11 the trial court asked Martinez at sentencing if he wanted to say anything, he
responded as follows:

12 Yeah, Your Honor. I just want to apologize to the
13 victim here. That night I was on drugs that did bad stuff to
14 me. I was, I know I was acting – some parts I barely
15 remember, but, since I’ve seen the video and everything, that
wasn’t really me. I[t] was some other person. I wouldn’t act
like that. I just want to apologize to the victim. That’s it.

16 Answer (Doc. 16), Ariz. Court of Appeals, Case No. 2 CA-CR 2014-0429-PR, Mem.
17 Decision 3/12/2015 (Exh. “Q”) at 80–81. The record reflects that Petitioner participated
18 in his court proceedings, and he does not present any evidence to suggest that he was
19 actually prejudiced by the lack of an interpreter. Petitioner has also failed to present any
20 evidence to show that the Arizona courts’ decisions regarding his ineffective assistance
21 claim are contrary to or an unreasonable application of clearly established Supreme Court
22 law or based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d); *see*
23 *also Bell v. Cone*, 535 U.S. 685, 698–99, 122 S.Ct. 1843, 1852, 152 L.Ed.2d 914 (2002).
24 Accordingly, this Court finds that the Arizona courts did not unreasonably apply clearly
25 established Federal law or unreasonably determine the facts in light of the evidence
26 presented, and Petitioner cannot meet his burden to show prejudice. *See Gulbrandson*,
27 738 F.3d at 991. Petitioner’s ineffective assistance of counsel claim regarding the alleged
28 failure to procure a court interpreter is without merit.

1 **B. *Grounds Two and Three: Lesser Included Instruction***
2 ***Regarding Endangerment***

3 Petitioner asserts that his due process rights, guaranteed under the Fourteenth
4 Amendment of the United States Constitution were violated because trial counsel was
5 ineffective for failing to request a lesser included offense jury instruction to the
6 endangerment counts. Petition (Doc. 1) at 7. Similarly, Petitioner alleges that appellate
7 counsel was ineffective for failing to raise this issue on direct appeal. *Id.* Respondents
8 assert that these claims were not presented as due process or Fourteenth Amendment
9 violations in his PCR petition, nor were they presented to the court of appeals. Answer
10 (Doc. 16) at 9–10.

11 Whether the Court considers Petitioner’s claims before the state court as alleging a
12 Fourteenth Amendment violation or a Sixth Amendment violation does not matter. The
13 record is clear that neither claim, as to trial counsel or appellate counsel, was presented to
14 the Arizona Court of Appeals. *See* Answer (Doc. 16), Ariz. Court of Appeals, Case No. 2
15 CA-CR 2014-0429-PR, Pet.’s Pet. for Review (Exh. “R”). As such, Petitioner cannot be
16 said to have exhausted this claim. *See Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004)
17 (citations omitted) (exhaustion requires pursuing a claim throughout an entire direct
18 appellate or post-conviction process in the state). Moreover, Petitioner’s claim would
19 now be precluded by the Arizona courts. Ariz. R. Crim. P. 32.1(d)–(h), 32.2(a)(3), 32.4;
20 *see also Baldwin v. Reese*, 541 U.S. 27, 29, 124 S.Ct. 1347, 1349, 158 L.Ed.2d 64 (2004)
21 (in order to “fairly present” one’s claims, the prisoner must do so “in each appropriate
22 state court”). Therefore, Petitioner’s claim is procedurally defaulted. *Coleman v.*
23 *Thompson*, 501 U.S. 722, 735 n.1, 111 S.Ct. 2546, 2557 n.1, 115 L.Ed.2d 640 (1991)
24 (“petitioner failed to exhaust state remedies and the court to which the petitioner would
25 be required to present his claims in order to meet the exhaustion requirement would now
26 find the claims procedurally barred”).

27 Where a habeas petitioner’s claims have been procedurally defaulted, the federal
28 courts are prohibited from subsequent review unless the petitioner can show cause and
actual prejudice as a result. *Teague v. Lane*, 489 U.S. 288, 298, 109 S.Ct. 1060, 1068,

1 103 L.Ed.2d 334 (1989) (holding that failure to raise claims in state appellate proceeding
2 barred federal habeas review unless petitioner demonstrated cause and prejudice).
3 Petitioner has not met his burden to show either cause or actual prejudice. *Murray v.*
4 *Carrier*, 477 U.S. 478, 494, 106 S.Ct. 2639, 2648, 91 L.Ed.2d 397 (1986) (Petitioner
5 “must show not merely that the errors . . . created a *possibility* of prejudice, but that they
6 worked to his *actual* and substantial disadvantage, infecting his entire trial with error of
7 constitutional dimensions”) (emphasis in original) (internal quotations omitted); *see also*
8 *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1305 (9th Cir. 1996) (petitioner failed to offer
9 any cause “for procedurally defaulting his claims[,] . . . [and as such,] there is no basis on
10 which to address the merits of his claims.”). Accordingly, Petitioner’s claims that either
11 trial counsel or appellate counsel were ineffective regarding the lesser included offense
12 jury instruction as to endangerment are without merit.

13
14 **V. CONCLUSION**

15 Based on the foregoing, the Court finds that Petitioner’s habeas claims are without
16 merit, and IT IS HEREBY ORDERED that:

17 1) Petitioner Eduardo Martinez’s *pro se* Petition Under 28 U.S.C. § 2254 for a
18 Writ of Habeas Corpus by a Person in State Custody (Non-Death Penalty) (Doc. 1) is
19 DENIED.


20 2) A certificate of appealability is DENIED, because reasonable jurists would
21 not find the Court’s ruling debatable. See 28 U.S.C. § 2253;

22 3) The Clerk of the Court shall send a copy of the docket sheet in this case to
23 Petitioner;

24 4) This matter is DISMISSED with prejudice; and

25 5) The Clerk of the Court shall enter judgment and close its file in this matter.

26 Dated this 25th day of February, 2019.

27
28 
Honorable Bruce G. Macdonald
United States Magistrate Judge